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No. 92-786

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DEBORAH A. STONE, *et al.*,
Petitioners,

v.

PRINCE GEORGE'S COUNTY BOARD OF EDUCATION,

and

SYLVESTER J. VAUGHNS, JR., *et al.*,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS SYLVESTER J. VAUGHNS, JR., ET AL., AND NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PRINCE GEORGE'S COUNTY CHAPTER, ET AL.

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether any unresolved issue of federal law is presented by the Court of Appeals' affirmance of factual findings and discretionary judgments of the district court based squarely on this Court's ruling in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), which approved the adoption of desegregation measures in an area of public school operations that is free of discrimination, because of the importance of such measures to eliminating vestiges of segregation in other areas of school operations, and which cited the district court's decision in this case as a valid example of that approach?

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OPINIONS BELOW

The decision below by the Court of Appeals, *Stone v. Prince George's County Bd. of Educ.*, No. 91-2127 (4th Cir. Sept. 28, 1992) (per curiam), is unreported. The district court's judgment is recorded in a reported decision, *Vaughns v. Bd. of Educ. of Prince George's County*, 742 F. Supp. 1275 (D. Md. 1990), and in several subsequently issued, unreported orders, *see* Pet. App. 8-21.

COUNTERSTATEMENT OF THE CASE

Petitioners ask this Court to review a decision affirming a remedial order issued by the federal trial judge who has supervised this school desegregation case since its inception. In particular, Petitioners challenge one component of a race-conscious faculty assignment policy the district court approved as "critical" to the overall success of its comprehensive plan to eliminate the vestiges of segregation in the Prince George's County, Maryland (the "County") Public Schools. Pet. App. 6; 62. The United States Court of Appeals for the Fourth Circuit upheld that judgment based on principles announced in *Freeman v. Pitts*, —— U.S. ——, 112 S. Ct. 1430 (1992), including this Court's specific approval of the district court's reasoning that the various components of its desegregation remedy are "interdependent upon and interact with one another." Pet. App. 6. The Petition fails to justify a grant of certiorari to reconsider the Court of Appeals' reliance on *Freeman*.

Respondents Sylvester J. Vaughns, Jr., *et al.*, initiated this case in 1972 alleging, *inter alia*, discrimination in the assignment of both faculty and students within the County schools. Pet. App. 28. Later that same year, a stipulation entered into by the parties recognized that "many of the school facilities operated by the defendant [Prince George's County School Board (the "Board")] which have racially disproportionate student bodies also have racially disproportionate faculties." *Id.* The parties also acknowledged the Board had in place a faculty desegregation policy, which it first adopted in 1971 in order to further desegregation of the County schools. *Id.* 26-27, 28-29, 57-58. In a decision this Court ultimately declined to review, the district court granted summary judgment in favor of the plaintiffs. *Vaughns v. Bd. of Educ. of Prince George's County*, 355 F. Supp. 1034 (D. Md. 1972); 355 F. Supp. 1038 (D. Md. 1972), *remanded for further proceedings on other grounds*, 468 F.2d 894 (4th

Cir. 1972); 355 F. Supp. 1051 (D. Md. 1972), *aff'd*, No. 73-1024 (4th Cir. Jan. 23, 1973), *cert. denied*, *Eller v. Bd. of Educ. of Prince George's County*, 410 U.S. 910 (1973). The district court did not order additional faculty desegregation measures, however, because "a plan for faculty [integration was] already in existence." 355 F. Supp. at 1037 n.3; *see* Pet. App. 29.[1]

After relinquishing active supervision of this case in 1976, the district court granted a 1981 motion to reopen the litigation filed by the Vaughns' plaintiffs, and consolidated it with the separate action filed by the National Association for the Advancement of Colored People, Prince George's County Chapter, *et al.* Following a lengthy trial on these claims, the district court held the County schools were not unitary, and ordered substantial additional relief. Although the district court ruled the County schools were free of faculty segregation and declined to approve additional faculty desegregation measures requested by the co-plaintiffs, the court made clear that ongoing faculty desegregation efforts should continue. *Vaughns v. Bd. of Educ. of Prince George's County*, 574 F. Supp. 1280, 1377 (D. Md. 1983), *aff'd*, 758 F.2d 983, 988 (4th Cir. 1985) ("*Vaughns II*"); *see* Pet. App. 58-59.

The faculty assignment policy that was begun in 1971 provided for the dismantling of segregated faculties in the County schools; since 1973, however, the sole purpose and operation of the policy has been limited to the avoidance of reestablishing racially identifiable schools, due to the racial identifiability of their faculty. *See* Pet. App. 3-5; *see also id.* 25-28, 32-44. Petitioners, who are teachers in the County schools, oppose a provision of the policy that applies to situations in which a school must lose one or more faculty for reasons unrelated to race—*e.g.*, declining enrollment, or budget cuts, and in which the re-

[1] Thus, Petitioners' sweeping assertion that "faculty assignment was not litigated in [the] desegregation lawsuit filed . . . in 1972," Pet. 4, is incorrect.

sulting transfer of the faculty member with the least seniority would shift the racial composition of a school's faculty to a point where it would become racially identifiable. *Id.* 38-44. In that event, another teacher, whose departure would not have such a segregative effect, is selected for involuntary transfer to another school. *Id.* 42. Between 1971 and 1990, this mechanism resulted in thirty-five transfers in a school system with approximately 6,000 teachers. Pet. 9-10; Pet. App. 44, 93-95.

Petitioners filed a complaint in 1989 asserting the involuntary transfer provisions of the faculty assignment policy violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Earlier that year, the United States filed a complaint asserting the same provisions violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (1982). *See* Pet. App. 23-24.

The district court rejected Petitioners' assertions that the faculty assignment policy was somehow independent of and unconnected to the Board's ongoing efforts to desegregate the school system and thereby to satisfy its constitutional obligations. The district court explained:

> [The Board's] faculty assignment policy constitutes an integral part of [its] effort to meet its continuing duty to attain unitary status. Had the Board defaulted on that responsibility and failed to ensure that its faculty assignment practices did not thwart attainment of that goal, this Court would have been obligated to issue an appropriate order requiring curative action by the Board. Moreover, had the Board attempted to rescind its current faculty assignment policy, this Court would have been empowered to order the Board to reinstate an acceptable faculty assignment policy.

Pet. App. 59-60. The district court also found that the faculty assignment policy remains a key element of its current remedy, which relies heavily on magnet schools

to achieve voluntary desegregation of student enrollments. *See Vaughns II*, 574 F. Supp. at 1377, *aff'd*, 758 F.2d at 988. In rejecting Petitioners' demands that the faculty assignment policy be discarded, the court found:

> [t]he avoidance of racially identifiable faculties is critical to a desegregation plan like that of Prince George's County which relies heavily on magnet schools. The success of magnet programs, after all, depends on parental choices which in turn may be shaped by perceptions of the characteristics of faculty. Curtailing the Board's power with respect to faculty assignments might result in consequences beyond the resegregation of faculties and could well threaten the success of the overall school desegregation program.

Pet. App. 62. As a result, the district court reaffirmed its commitment to continued implementation of faculty desegregation measures "while it acknowledged that there was no need to continue assignment of faculty by race so far as the faculty itself was concerned." *Id.* 6.

Although the district court ruled the faculty assignment policy was not "voluntary," Pet. App. 70, the court ordered changes in the policy to ensure it was "narrowly tailored" to achieve compelling goals, as this Court has held the Constitution requires of voluntary race-conscious remedies. *Id.* 94-95. The district court subsequently issued an order approving specific modifications, to be applied retroactively. *Id.* 15-21; *see* Pet. 10. These modifications also satisfied the United States' objections based on Title VII. *See id.* 96-105.

Petitioners appealed the district court's final order; the United States did not. After the Court of Appeals held oral argument, this Court issued its decision in *Freeman v. Pitts*. The Fourth Circuit then asked for additional briefing in this case on the impact of *Freeman*, which cited the district court's July 1990 opinion with approval. *See* 112 S. Ct. at 1449. Thereafter, the Court

of Appeals affirmed, basing its decision largely on the same principle for which *Freeman* had cited the district court's opinion. Petitioners did not seek en banc review in the Court of Appeals.

REASONS FOR DENYING THE WRIT

The Petition presents no basis for this Court to reconsider the legal rulings of the lower courts in this case, which are completely consistent with this Court's recent decision in *Freeman v. Pitts*. Petitioners also offer this Court no reason to stray from its traditional refusal to review findings of fact and discretionary judgments, upheld on appeal, particularly where, as here, they involve supervision of a complex equitable remedy by a trial judge who has supervised the case through two decades.

This Court previously has cited with approval the same findings and reasoning of the district court the Petitioners now ask the Court to grant certiorari to review. *See Freeman*, 112 S. Ct. at 1449. Plainly, this matter raises no special or important issues of federal law for this Court to address. *See* Sup. Ct. R. 10.1.

I. THE COURT OF APPEALS APPLIED CLEAR LEGAL PRINCIPLES STATED BY THIS COURT IN *FREEMAN v. PITTS* AND THUS, THERE ARE NO LEGAL CONFLICTS FOR THE COURT TO RESOLVE

This Court's decision in *Freeman v. Pitts* directly addressed and resolved the very issue Petitioners now seek to have this Court review. Indeed, the Court's reasoning in *Freeman* is based in part on the district court's resolution of the questions raised by the Petition. As a result, the Court of Appeals made *Freeman* the principle focus of its decision. Remarkably, however, Petitioners ignore the *Freeman* Court's approving citation of the district court's analysis, the Fourth Circuit's affirmance of that same analysis, and the Court of Appeals' reliance on

Freeman in other respects. *See* Pet. App. 5-7. These omissions are particularly striking in light of the Court of Appeals' specific request for separate briefing on the relevance of *Freeman* to this case. Petitioners' unwillingness to face these issues cannot change the fact that this case presents settled legal questions unworthy of reconsideration by this Court.

In *Freeman*, this Court held that it is within the discretion of a federal district court to end desegregation measures that may no longer be necessary in one area of public school operations, where no vestiges of segregation remain, before freeing a school district from its jurisdiction altogether. *Freeman*, 112 S. Ct. at 1445-46. The Court further ruled that in some instances, desegregation measures may be necessary in an area of school operations that is free of discrimination in order to ensure the success of related measures designed to eliminate lingering vestiges of segregation in other areas of school operations. *Id.* at 1449. The Court observed it had "long recognized that the *Green* factors"—areas of school operations that must be freed of the vestiges of segregation, *see Green v. New Kent County School Bd.*, 391 U.S. 430, 436 (1968)—"may be related or interdependent." *Freeman*, 112 S. Ct. at 1449. That is,

> two or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well. We have observed, for example, that student segregation and faculty segregation are often related problems. [citations omitted]. . . . As a consequence, a continuing violation in one area may need to be addressed by remedies in another. *See, for example, Bradley v. Richmond School Bd.*, 382 U.S. 103, 105 (1965) (*per curiam*) . . .; *Vaughns v. Board of Education of Prince George's County*, 742 F. Supp. 1275, 1291 (D. Md. 1990) ("[T]he components of a school desegregation plan are interdependent upon and interact with

> one another so that changes with respect to one component may impinge upon the success or failure of another").

Id. *See also* Pet. App. 52-53 (discussing this Court's rulings recognizing the importance of faculty desegregation measures to successful desegregation of student assignments). Petitioners offer no reason for the Court to question these clear principles of school desegregation law.

Based on *Freeman*, the Court of Appeals upheld the district court's approval of the faculty assignment policy as a vital measure related to other court-approved desegregation efforts in the County Schools. Pet. App. 6-7. The Court of Appeals also cited *Freeman* for the proposition that the district court had discretion to approve the faculty assignment plan despite its finding that the County schools were unitary with respect to faculty. Pet. App. 4-5, 6-7. Petitioners advance no grounds for the Court to grant certiorari to reconsider these legal rulings.

The Petitioners also fail to present any basis for the Court to review the Fourth Circuit's affirmance of "findings of the district court," that it characterized as "largely factual and . . . not clearly erroneous," Pet. App. 6-7, to the effect "that the racially based faculty assignment plan was critical to the desegregation plan of Prince George's County." *Id.* 6. The Court of Appeals specifically sustained the district court's findings that the absence of the challenged policy could leave the Board and the court with "the sole option of altered student assignment policies," which might "well doom the Board's pursuit of unitary status to failure." *Id.*[2]

[2] The Fourth Circuit also held, and Petitioners do not dispute, that the district court's "findings . . . are adequate under *Freeman*," even though the court's orders at issue pre-dated *Freeman*. Pet. App. 7.

Petitioners ask this Court to depart from its traditional role as a "court of law, . . ., rather than a court for correction of errors in fact-finding." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Because it is a court of law, this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *quoting Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).[3] Petitioners have failed to make such an "exceptional showing of error," and therefore, a decision to review the lower courts' rulings would be inconsistent with this Court's "traditional deference to the 'two court rule.'" *United States v. Ceccolini*, 435 U.S. 268, 273 (1978) (citation omitted).[4]

Petitioners' principal legal assertion, that the Court of Appeals' decision conflicts with other federal appellate rulings, Pet. 11, is baseless. Even if Petitioners' expansive interpretations of *Singleton v. Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1969), and subsequent Fifth Circuit cases, were valid, it could not jusitfy the Court's reconsideration of its own recent, unambiguous, and contrary holdings in *Freeman*. *See* 112 S. Ct. at 1449. Likewise, the Petition refers to a non-existent split among the federal appellate courts on the issue "whether nonunitariness in one facet of a school

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[3] *See also, e.g., Tiffany Arts, Inc. v. United States*, 469 U.S. 310, 317-18 n.5 (1985) (noting "reluctance to disturb findings of fact concurred in by two lower courts"); *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 n.15 (1984) (Court accords "great weight to a finding of fact which has been made by a district court and approved by a court of appeals"); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (same).

[4] The challenged findings of fact are even less appropriate for review in this Court than ordinarily would be the case, because they were made by a trial court judge who has had continuing supervision over the *Vaughns* litigation since 1972.

district (*e.g.*, student assignments) justifies race-conscious remedies in other facets (*e.g.*, teacher assignments)." Pet. 13. Petitioners apparently would have this Court pretend it never decided *Freeman*, which clearly resolves this issue.

II. THE PETITION FAILS TO RAISE ANY SERIOUS QUESTION REGARDING THE VALIDITY OF THE COURT OF APPEALS' RELIANCE ON *FREEMAN v. PITTS* RATHER THAN THE COURT'S RULINGS IN *WYGANT* AND *SPANGLER*

Without identifying any flaw in the Fourth Circuit's reliance on *Freeman v. Pitts*, Petitioners urge this Court to grant certiorari in order to apply *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) to this case. Petitioners' request is wholly unfounded because neither of these two precedents is apposite.

First, Petitioners fails to show how or why *Spangler* bars the Court of Appeals' reliance on *Freeman v. Pitts*, or to address the district court's careful analysis of *Spangler*'s inapplicability to this case. *See* Pet. App. 60-61. That analysis centered on the fact that *Spangler* involved circumstances very different from those at issue in Prince George's County. Unlike this case, in which the Board was expected to make progress toward unitary status one "step at a time" and to "submit . . . plans by definition incomplete at inception,"[5] *Spangler* involved a remedial plan that achieved desegregated student enrollments immediately, upon implementation; for that reason, the Court condemned an ongoing requirement of "no majority of any minority" in any school. 427 U.S. at 435.

Petitioners' suggestion that this Court must grant certiorari in order to preserve *Spangler*'s prohibition

[5] *See* Pet. App. 61 (in this case, "[f]rom the inception . . . the parties understood and accepted that the plan was subject to modification and monitoring").

against measures designed to ensure a fixed level of racial balance "in perpetuity," Pet. 15, is frivolous. The involuntary transfer provisions, as modified by the district court, *see* Pet. 9-10, are plainly flexible. Petitioners' insistence—unaccompanied by any analysis—in describing them as "rigid racial ratios" does not make them so, or justify this Court's review of such a question of fact. Moreover, the district court plainly views its desegregation plan—including the faculty provisions—"not as a permanent measure, but rather as a temporary aid to the eventual achievement of unitary status which, hopefully, will occur in the near future." Pet. App. 103.

The Court also should decline Petitioners' invitation that it review the Fourth Circuit's order in light of *Wygant* and *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), because the Court of Appeals plainly did not reach any aspects of the district court's ruling implicating those decisions. The district court approved the challenged faculty assignment plan because of its critical contribution to the school system's ongoing efforts to desegregate, basing its decision on *Green v. New Kent County School Bd.*, 391 U.S. 430 (1968), and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Then, in an alternative holding that would have been necessary only if, contrary to the district court's findings, the "Board's policy is a strictly voluntary measure," Pet. App. 70, the district court held that the faculty assignment plan satisfied the "strict scrutiny" standard set forth in *Wygant* and *Croson*. The Court of Appeals had no occassion to consider this alternative holding because it sustained the faculty assignment policy as a court-ordered desegregation measure. *Id.* at 6-7. Accordingly, the issue of the validity of the policy as a purely voluntary race-conscious remedy is not before this Court.

Finally, there is no legal foundation for Petitioners' argument that the lower courts erred in failing to apply a strict scrutiny test to the faculty assignment policy as

a court-ordered remedy. *See* Pet. 16. Once again, Petitioners simply ignore, and thus fail to identify any problem with, the Court of Appeals' explicit reliance on the clear legal standards for review of court-ordered school desegregation measures that this Court set forth in *Freeman*. *See* Pet. App. 5.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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December 4, 1992

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